

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Varsity Gold, Inc.,

Plaintiff,

v.

Eric Biggam, individually; et al.,

Defendants.

CASE NO. C06-509RSM

ORDER ON PENDING DISCOVERY
MOTIONS

This matter is before the Court for consideration of two discovery motions filed by defendants: a motion for a protective order (Dkt. # 62), and a motion to compel (Dkt. # 66). Having reviewed both motions, the responses and replies, the Court deems oral argument unnecessary, and now finds and rules as set forth below.

I. Motion for a Protective Order

Defendants filed this motion on November 15, 2006, properly noting it for November 28, 2006, as a “seven-day” motion under Local Rule CR 7(d)(2)(D). As a threshold matter, defendants assert that plaintiff’s opposition, filed November 24, 2006, was untimely and should not be considered. Pursuant to the local rule, plaintiff’s response was due three days before the noting date. As this time period is less than eleven days, under F.R.Civ.Proc. 6(a), only “judicial” days are counted, excluding weekends and

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1 holidays. Counting back three judicial days from Tuesday, November 28 would make the opposition due
2 the previous Thursday, November 23. As this day was itself a holiday, defendants contend that it should
3 be excluded from the “three-day” computation, making the response due the previous day, on
4 Wednesday, November 22. However, this interpretation conflicts with the earlier directive in Rule 6 that
5 when a due date for a response falls upon a day that the courthouse is closed, the response is due the
6 following day, which would be Friday, November 24.

7 Defendants contend that interpreting the rule in this way would unfairly deprive them of the time
8 for filing a reply. However, defendants as the moving party originally chose the noting date for their
9 motion, and could have anticipated this result. Had defendants believed they were prejudiced, they could
10 have requested an additional day to file a reply. This Court has consistently followed the rule that when a
11 due date falls on a holiday, the filing date is extended to the next judicial day, not a previous one. The
12 Court has also, upon request, routinely granted additional time for filing a reply when the response time
13 was reduced by application of the rule. Defendants did not request additional time of the Court, and it
14 appears that they were not prejudiced in their ability to file a reply. Their request that the Court find
15 plaintiff’s opposition untimely is therefore denied.

16 Turning to the motion for a protective order itself, the Court finds that defendants have failed to
17 meet the certification requirement of Rule 26(c), pursuant to which this motion for a protective order has
18 been brought. The relevant section states that such motion must be “accompanied by a certification that
19 the movant has in good faith conferred or attempted to confer with other affected parties in an effort to
20 resolve the dispute without court action.” F.R.Civ.Proc. 26(c). The “good faith” aspect of defendants’
21 attempt to confer shall be addressed below, in relation to defendants’ motion to compel. As to the
22 motion for a protective order, even without reaching the question of good faith, the Court finds that
23 defendants did not confer at all with respect to the subject matter of the dispute.

24 Defendants’ certification statement is that “[o]n Tuesday afternoon, November 14th, the Bighams
25 conferred with Varsity Gold counsel and were unable to resolve **the issue here.**” Motion for Protective
26 Order, Dkt. # 62, p. 6 (emphasis added). The copies of the electronic correspondence (“e-mails”)

1 between counsel, filed by both parties here, demonstrate that while defendants did request a Rule 37
2 discovery conference, the proposed subject of that conference was plaintiff's interrogatory responses.
3 *See*, Declaration of David Lowe, Dkt. # 79, Exhibit B ("with regards to your responses, I anticipate a CR
4 conference to address incomplete or completely absent responses. . . ") ("as to the Rule 37, it does not
5 appear premature at least with regards to interrogatory responses"); Exhibit D ("As your schedule
6 appears to prevent a prompt CR 37 conference with regards to your interrogatory responses, please
7 consider this email my attempt to confer with you . . . "). Nowhere did defendants mention a request for
8 a protective order regarding their own document production as a basis for the Rule 37 conference (which,
9 as shown below, was not ever held).

10 Thus, defendants' certification statement that they conferred with plaintiff on November 14th to
11 resolve the issues presented in the motion for a protective order is not correct. In the absence of a proper
12 showing of compliance with the Rule 26(c) certification requirement, defendants' motion (Dkt. # 62) is
13 DENIED.

14 II. Motion to Compel

15 In this motion, defendants seek to compel full and complete responses to their first set of
16 interrogatories and requests for production. The Court upon review of the written correspondence
17 exchanged between counsel finds that it cannot reach the merits of this motion, because defendants have
18 failed to meet the Rule 37 certification requirement.

19 Rule 37 states, in relevant part, that a motion to compel "**must** include a certification that the
20 movant has in good faith conferred or attempted to confer with the person or party failing to make the
21 discovery in an effort to secure the information or material without court action." F.R.Civ.P. 37(a)(2)(B)
22 (emphasis added). The companion local rule requires that such good faith conference must be either
23 face-to-face or by telephone. Local Rule CR 37(a)(2)(A).

24 Defendants' certification states that they "hav[e] made best efforts to confer with Varsity Gold
25 pursuant to Fed.Rule Civ.P. 37(a)(2)(B) and Local Rule 37(a)". The copies of electronic
26 communications exchanged between counsel in the relevant time period demonstrate otherwise.

1 Defense counsel first mentioned scheduling a Rule 37 conference to address plaintiff's discovery
2 responses on Tuesday, November 7, asking that it be set for Thursday, two days later. Declaration of
3 David Lowe, Dkt. # 86, Exhibit B. Within twenty minutes, opposing counsel David Lowe responded that
4 his schedule did not permit scheduling the conference during that same week. *Id.* Defense counsel Pat
5 Pearce wrote back three hours later, asking what time plaintiff's counsel could schedule the conference
6 on the following Monday or Tuesday, November 13 or 14.¹ *Id.* Mr. Lowe responded the following day
7 that he would have time available in the afternoon of Tuesday, November 14, and asked defense counsel
8 to advise him if he wished to schedule a conference at that time. Dkt. # 86, Exhibit C. Instead of
9 suggesting a time on Tuesday afternoon as offered, Mr. Pearce responded late that afternoon with the
10 following message:

11 As your schedule appears to prevent a prompt CR 37 conference with regards to your
12 interrogatory responses, please consider this email my attempt to confer with you in an
13 effort to avoid having to secure the information through court action. As we are both
14 unavailable Friday, I am providing this to you today, Wednesday the 8th, so that you
may provide me with your responses to my concerns by the end of the day tomorrow,
Thursday the 9th. This should be enough time for you to respond and any further delay
would seem unnecessary and dilatory.

15 Dkt. # 86, Exhibit D. This e-mail gave opposing counsel only twenty-four hours to respond. Mr. Lowe
16 did respond with a reminder that Rule 37 requires a good faith in-person or telephonic conference. *Id.*
17 The same message reminded Mr. Pearce that a time had been proposed for a conference on the following
18 Tuesday afternoon, but he had refused to respond to the offer. *Id.* That evening, defense counsel sent
19 another message stating, "You are wrong on what CR 37 requires. I suggest you review the rule and
20 point me to the part that requires an in person or telephonic conference." *Id.* The following day,
21 Thursday, defense counsel admitted his mistake on that point, and asked that counsel "give me your times
22 for Tuesday, preferably in the morning." *Id.* However, defense counsel had already been advised that
23 opposing counsel David Lowe was unavailable (by telephone or e-mail) on Thursday and through the

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25 ¹Friday, November 10 was a federal holiday for Veterans' Day, a fact that was noted later by
26 defense counsel in deferring his own production of documents until Monday, November 13. Dkt. # 86,
Exhibit F ("Accordingly, David, I will have to refuse your request to produce documents tomorrow.
Regrets.")

1 long weekend. Defense counsel then began e-mailing Mr. Lowe's co-counsel, asking that he conduct the
2 CR 37 conference in place of Mr. Lowe that same day. *Id.* Co-counsel responded that he was not
3 familiar with the discovery issues, and he believed it could wait until Tuesday. *Id.*

4 The following Monday, November 13, defense counsel e-mailed Mr. Lowe's assistant Sarah Gist,
5 asking to schedule the CR 37 conference on Tuesday at 11:30 or as close to that time as possible. Dkt. #
6 86, Exhibit G. Ms. Gist responded right away, saying that Mr. Lowe had a matter at 11:00 and it would
7 be better to schedule the conference for the afternoon. Dkt. # 86, Exhibit H. Defense counsel wrote
8 back and asked to schedule the conference at 10:30, saying that the afternoon "is not a good option", but
9 without explaining why. *Id.* Ms. Gist responded that she needed to reach Mr. Lowe to schedule the
10 matter, and defense counsel responded that he strongly preferred to confer in the morning, but that, "[i]f
11 there are no possible times other than the afternoon, then let me know what times work then and I'll see
12 if I can adjust my schedule." *Id.* Late on Monday afternoon, Ms. Gist wrote back to say she had been
13 unable to reach Mr. Lowe but would firm up a time for the conference the following day. Defense
14 counsel then re-iterated his expectation that the conference would take place on Tuesday. *Id.*
15 Minutes later, Ms. Gist wrote that she had reached Mr. Lowe, and that he was available Tuesday
16 afternoon "between 3:00 and 4:30 to discuss both parties' production." She asked defense counsel to let
17 her know "if this timeframe will work for you as well." *Id.* Defense counsel's response states, in its
18 entirety, "Works for me, yes." *Id.* Ms. Gist replied early the next morning, Tuesday: "Great. We will
19 wait for your call at 3:00 p.m." *Id.* Defense counsel did not respond to controvert this expectation.

20 The parties agree that defense counsel did not call in at 3:00. Mr. Lowe attempted to call him to
21 initiate the conference at 3:10, but Mr. Pearce was not available. Mr. Lowe left a message that he was
22 awaiting a call. Dkt. # 86, ¶ 12. Mr. Lowe waited until 4:20 pm, and then took a conference call from
23 another client. He was on the telephone until 5:30 pm. *Id.*

24 At 4:22 pm, defense counsel responded to Ms. Gist's e-mail from that morning, saying that he did
25 not agree to call at 3:00; he agreed to call sometime between 3:00 and 4:30, and was now calling to
26 conduct the conference. Dkt. # 86, Exhibit I. His call to Mr. Lowe at 4:22 pm was met with a busy

1 signal. Defense counsel called and e-mailed several more times over the next few minutes, but Mr.
2 Lowe's line was still busy. *Id.* Defense counsel also called Ms. Gist and discussed Mr. Lowe's
3 availability with her; the tone of his call is described by her in her declaration. Declaration of Sarah Gist,
4 Dkt. # 87. Ms. Gist, on the phone and by e-mail at 4:54 pm, offered to re-schedule the conference for
5 Thursday, November 16, but defense counsel did not know if he wanted to reschedule. *Id.*, ¶ 8; Dkt. #
6 86, Exhibit I. Later that evening, Mr. Lowe sent an e-mail to defense counsel, repeating the offer to re-
7 schedule the conference for Thursday morning. Defense counsel did not respond to that offer, and
8 instead filed this motion to compel on November 16, asserting the he had made a good faith effort to
9 meet and confer pursuant to Rule 37.

10 The Court has set forth the communications between counsel in detail, because defendants have
11 requested oral argument on this motion. The Court deems it unnecessary to consume additional time of
12 counsel and the Court in oral argument, because the e-mails speak for themselves. These e-mails, and the
13 accompanying declarations, demonstrate that: (1) both counsel agreed to conduct the Rule 37 conference
14 in the "timeframe" from 3:00 to 4:30 pm on Tuesday, November 14; (2) Ms. Gist advised defense
15 counsel at 9:03 that morning that they would expect his call at 3:00; (3) defense counsel did not respond
16 to Ms. Gist's e-mail, did not call in at 3:00, was not in his office at 3:10 when Mr. Lowe called him, and
17 by his own declaration was not back in his office and ready to initiate the conference call until 4:21 pm;
18 (4) Mr. Lowe was available to take the call from 3:00 until 4:20 pm; and (5) Mr. Lowe and his assistant
19 both offered to re-schedule the conference for Thursday morning but defense counsel did not respond to
20 either offer.

21 Nowhere has defense counsel explained why he did not respond to the e-mail saying opposing
22 counsel would expect his call at 3:00. Nor has he explained why he was out of the office and unavailable
23 by telephone until 4:21 pm on Tuesday, at the very end of the agreed "timeframe". Under these
24 circumstances, and in the context of the e-mail exchanges in which defense counsel asked for the
25 conference as early on Tuesday as possible, it was reasonable for Mr. Lowe to assume that the
26 conference would begin close to 3:00. Conversely, it was unreasonable for defense counsel to assume

1 that the agreement on a "timeframe" meant that the conference could begin at 4:21 and be concluded by
2 4:30. His assertion that opposing counsel unilaterally modified the agreed time frame for the conference
3 is wholly without basis.

4 For these reasons, the Court finds that defense counsel did not make a good faith effort to meet
5 and confer prior to filing this motion to compel. Accordingly, the motion (Dkt. # 66) is DENIED
6 pursuant to F.R.Civ.P. 37(a)(2)(B) and Local Rule CR 37(a)(2)(A).

7 III. Expenses and Sanctions

8 Pursuant to Rule 37, when a motion to compel is denied, the Court shall, after affording an
9 opportunity to be heard, require the moving party or attorney, or both, to pay to the opposing party the
10 reasonable expenses incurred in bring the motion, unless the Court finds that the bringing of the motion
11 was substantially justified, or other circumstances make an award of expenses unjust. F.R.Civ.Proc.
12 37(a)(4)(B). This provision applies to a motion for a protective order as well. F.R.Civ.Proc. 26(c).

13 Here, because the Court did not reach the merits of either motion, it cannot be determined
14 whether defendants were substantially justified in bringing them. The Court's finding of no good faith
15 effort to meet and confer weighs in favor of a finding that the motions were brought prematurely, but is
16 not determinative as to justification. Accordingly, the Court directs the parties to file, within two weeks
17 of this date, supplemental briefing on the issues of justification and other factors which might make an
18 award of expenses unjust. Such supplemental memoranda shall be limited to twelve pages each, including
19 all attached declarations or other materials.

20 Dated this 19th day of January, 2007.

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23 RICARDO S. MARTINEZ
24 UNITED STATES DISTRICT JUDGE
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